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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.03.2020
Dated : 28.05.2020

Coram

The Honourable Mr.Justice M.M.SUNDRESH

The Honourable Mr.Justice V.BHARATHIDASAN and

The Honourable Mr. Justice N.ANAND VENKATESH

Criminal Appeal Nos.89 & 90 of 2020 and Criminal Revision Case Nos.494 & 536 of 2019 & Crl.M.P.No.1789, 1794 & 7289 of 2019

Criminal Appeal Nos.89 & 90 of 2020

K.Rajalingam ... Appellant in both Appeals

Vs.

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R.Suganthalakshmi ... Respondent in both Appeals

Criminal Revision Case Nos.494 of 2019

M.Venkataraman .. Petitioner

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Vs.

D.G.Bhaskaran .. Respondent

Criminal Revision Case Nos.536 of 2019

Dharani .. Petitioner

Vs.

R.Prabhagaran .. Respondent

Criminal Appeals are filed under Section 378(4) of the Code of Criminal Procedure, 1973 as against the judgment dated 21.12.2018 made by the III Additional Sessions Judge, City Civil Court, Madras, in C.A.Nos.171 of 2018 and 172 of 2018.

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Criminal Revision Case No.536 of 2019 is filed under Sections 397 and 401 of the Code of Criminal Procedure, 1973, as against the judgment dated 02.01.2019 made in C.A.No.16 of 2016 by the III Additional Sessions Judge, Tiruvallur at Poonamallee dismissing the complaint by judgmet dated 14.12.2015 in STC No.495 of 2012 on the file of Judicial

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Magistrate No.II, Ponneri.

For Appellant in Crl.A.Nos.89 & 90 : Mr.Sarath Chandran & T.M.Mano for of 2020
Mr.Govind Chandrasekar

For Appellant in Crl.R.C.Nos.494/2019 : Mr.Arun Anbumani & Mr.Arya Raj

For Appellant in Crl.R.C.Nos.536/2019 : No appearance

For Respondent in Crl.R.C.No.494/2019 : Mr.S.Subramanian and Mr.S.Sudharshan

For Respondent in Crl.R.C.No536/2019 : No appearance

: Mr.N.Jothi

: Mr.AR.L.Sundaresan,S.C., (Amicus) in MBA.,

: Mr.Vijayaraghavan

: Mr.A.Thiagarajan,S.C., for MHA & WLA

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COMMON JUDGMENT

M.M.SUNDRESH,J.

The decision rendered by the Full Bench of this Court in S.Ganapathy V. N.Senthilvel ((2016) 4 CTC 119) was doubted by the learned single Judge

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while dealing with Criminal Revision Case Nos.494 & 536 of 2019 and Crl.A.SR.Nos.25084 and 25112 of 2019. The doubt raised is to the maintainability of the appeal by the complainant against an order of acquittal confirmed before the Court of Sessions invoking the proviso to Section 372 of the Criminal Procedure Code. The incidental issue is on the question of leave to be obtained. As a corollary, the learned single Judge, framed some more issues as well. This reference has been sought for on the seminal question as to whether the remedy lies as against an order of acquittal passed by a Magistrate on a complaint whether it is under proviso to Section 372 of the Criminal Procedure Code or under Section 378(4) of Criminal Procedure Code. The issues framed are profitably quoted hereunder.

i. When a Magistrate acquits an accused in a case instituted upon a private complaint, like a prosecution under Section 138 of the NI Act, where does the remedy lie for the unsuccessful complainant - Whether to the Court of Session under the proviso to Section 372 Cr.P.C. or before the High Court under Section 378(4) and (5) Cr.P.C. or are there concurrent remedies available, with the right to the

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complainant to elect the forum of choice?

ii. If the remedy is under the proviso to Section 372 Cr.P.C., should the complainant seek special leave from the Court of Session and if so, under what provision of law?

iii. What is the period of limitation for filing an appeal against acquittal before the Court of Session under the proviso to Section 372 Cr.P.C. in a private complaint case like Section 138 of the NI Act?

iv. If the answer to Question No.i under reference is that the appeal will have to be filed under the proviso to Section 372 Cr.P.C., then, if such appeal filed by the complainant before the Court of Session is dismissed and the order of acquittal passed by the Magistrate is upheld, does the complainant have a remedy to file a revision under Section 397 read with Section 401 Cr.P.C. before the High Court or file another round of appeal against such acquittal by the Court of Session before the High Court under Section 378(4) & (5) Cr.P.C.?

v. If the complainant has the revisional remedy before

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the High Court under Section 397 read with Section 401 Cr.P.C., can the High Court set aside only the Appellate Court's order or the Trial Court's order or the orders of both the Courts below?

vi. In the event of the larger Bench holding that the complainant who has lost before the Trial Court and the Court of Session has the remedy to file a revision under Section 397 read with Section 401 Cr.P.C. before the High Court, then, after setting aside the orders, should the High Court remand the case to the Court of Session or to the Trial Court for re-trial?

vii. In the event of the law laid down by the Full Bench in S. Ganapathy (supra) being overruled, what impact would such overruling have on the cases which have been decided by the Courts of Session during the interregnum?

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2.The Honourable Chief Justice, after going through the issues framed and the reasons assigned by the learned single Judge and after taking note of the law laid down qua the framing of the issues in exercise of the powers

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vested under Order I Rule 6 read with Rule 7 of the High Court of Madras, Appellate Side, 1965, referred the matter by constituting a Full Bench consisting of three of us to answer the questions raised. The Honourable Chief Justice accordingly opined that it is legally permissible for a single Judge, who doubts a decision of the Larger Bench to seek for a Reference. This Reference has been made consciously after taking note of the subsequent decisions of the Apex Court governing the field wherein one of the judgments which took into consideration the earlier judgment of the Apex Court, which weighed heavily in the minds of the Full Bench.

3. Having gone through the questions referred and keeping in mind Order 1 Rule 6 read with Rule 7 of the Rules of High court of Madras Appellate Side Rules, 1965, we believe that we can go into all the issues referred to us including the incidental questions apart from the legality of the decision rendered in **S.Ganapathy V. N.Senthilvel ((2016) 4 CTC 119)** and the consequences arising out of the same. With the said understanding, let us proceed further.

4. The question that was raised before the Full Bench in

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S.Ganapathy's case(supra) was whether the word 'victim' is synonymous with the word 'complainant' with specific reference to proviso to Sections 372 and 378(4) of the Criminal Procedure Code. The Full Bench, placing reliance upon the judgment of the Apex Court in **Satya Pal Singh V. State of Madhya Pradesh and others ((2015) 15 Supreme Court Cases 613),** which arose out of a Police Report, pursuant to a First Information Report lodged and registered, held that the term victim also includes a complainant and he can also avail of the remedy under proviso to Section 372 of Cr.P.C. And file an appeal against an order of acquittal.

5. Unfortunately, it was not brought to the notice of the Full Bench the decision rendered by the Apex Court in **Damodar S. Prabhu V. Sayed Babalal H. ((2010) 5 Supreme Court Cases 663),** which directly considered the very issue. The following paragraph would be apposite.

> "20. It may be noted here that Section 143 of the Act makes an offence under Section 138 triable by a Judicial Magistrate First Class (JMFC). After trial, the progression of further legal proceedings would depend on whether there has been a conviction or an acquittal.

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- In the case of conviction, an appeal would lie to the Court of Sessions under Section 374(3)(a) of the CrPC; thereafter a Revision to the High Court under Section 397/401 of the CrPC and finally a petition before the Supreme Court, seeking special leave to appeal under 136 of the Constitution of India. Thus, in case of conviction there will be four levels of litigation.
- In the case of acquittal by the JMFC, the complainant could appeal to the High Court under Section 378(4) of the CrPC, and thereafter for special leave to appeal to the Supreme Court under Article 136. In such an instance, therefore, there will be three levels of proceedings.

6. It is to be remembered that the decision in Damodhar's case(supra) has been rendered by a Coram of three Honourable Judges of the Apex Court as against Satya Pal Singh's case(supra) presided by two. Therefore, even on the principle governing law of precedent, the earlier decision would hold the field. This is de hors the fact that the former dealt with a 'complaint' and the latter dealt with a victim in a police report.

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7. Therefore, even on the date of hearing and delivering the judgment in S.Ganapathy's case, the decision of the Apex Court in Damodhar's case was holding the field. Perhaps, the present situation would not have arisen had it been brought to the notice of the Full Bench.

8. In a subsequent decision in **Subhash Chand V. State (Delhi Administration) ((2013) 2 Supreme Court Cases 17),** the Apex Court was pleased to hold that a complainant can only file an appeal with a special leave to the High Court against an order of acquittal and not to a Court of Sessions. This was held after assessing the scope and ambit of Section 378 of the Criminal Procedure Code through the following paragraphs.

> "17. At the outset, it must be noted that as per Section 378(3) appeals against orders of acquittal which have to be filed in the High Court under Section 378(1)(b) and 378(2)(b) of the Code cannot be entertained except with the leave of the High Court. Section 378(1)(a) provides that, in any case, if an order of acquittal is passed by a Magistrate in respect of a cognizable and non-bailable offence the District Magistrate may direct the Public Prosecutor to present an appeal to the court of Sessions. Sub- Section (1)(b) of Section 378 provides that, in any case, the State Government may direct the Public Prosecutor to file an appeal to the High Court from an

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original or appellate order of acquittal passed by any court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision. Sub-Section(2) of Section 378 refers to orders of acquittal passed in any case investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 or by any other agency empowered to make investigation into an offence under any Central Act other than the Code. This provision is similar to sub-section(1) except that here the words 'State Government' are substituted by the words 'Central Government'.

18. If we analyse Section 378(1)(a) & (b), it is clear that the State Government cannot direct the Public Prosecutor to file an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence because of the categorical bar created by Section 378(1)(b). Such appeals, that is appeals against orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence can only be filed in the Sessions Court at the instance of the Public Prosecutor as directed by the District Magistrate. Section 378(1)(b) uses the words "in any case" but leaves out orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence from the control of the State Government.

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Therefore, in all other cases where orders of acquittal are passed appeals can be filed by the Public Prosecutor as directed by the State Government to the High Court.

19. Sub-Section (4) of Section 378 makes provision for appeal against an order of acquittal passed in case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This sub-section speaks of 'special leave' as against sub-section (3) relating to other appeals which speaks of 'leave'. Thus, complainant's appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. This is evident from sub-section (5) which refers to application filed for 'special leave' by the complainant. It grants six months period of limitation to a complainant who is a public servant and sixty days in every other case for filing application. Sub- Section (6) is important. It states that if in any case complainant's application for 'special leave' under sub-Section (4) is refused no appeal from order of acquittal shall lie under sub-section (1) or under sub- section (2). Thus, if 'special leave' is not granted to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate not the State Government

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can appeal against that order of acquittal. The idea appears to be to accord quietus to the case in such a situation.

20. Since the words 'police report' are dropped from Section 378(1) (a) despite the Law Commission's recommendation, it is not necessary to dwell on it. A police report is defined under Section 2(r) of the Code to mean a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code. It is a culmination of investigation by the police into an offence after receiving information of a cognizable or a non- cognizable offence. Section 2(d) defines a complaint to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. Explanation to Section 2(d) states that a report made by a police officer in a case which discloses after investigation, the commission of a non- cognizable offence shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant. Sometimes investigation into cognizable offence conducted under Section 154 of the Code may culminate into a complaint case (cases under the Drugs & Cosmetics Act, 1940). Under the PFA Act, cases are instituted on filing of a

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complaint before the Court of Metropolitan Magistrate as specified in Section 20 of the PFA Act and offences under the PFA Act are both cognizable and non- cognizable. Thus, whether a case is a case instituted on a complaint depends on the legal provisions relating to the offence involved therein. But once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence be bailable or non- bailable, cognizable or non- cognizable, the complainant can file an application under Section 378(4) for special leave to appeal against it in the High Court. Section 378(4) places no restriction on the complainant. So far as the State is concerned, as per Section 378(1)(b), it can in any case, that is even in a case instituted on a complaint, direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than High Court. But there is, as stated by us herein above, an important inbuilt and categorical restriction on the State's power. It cannot direct the Public Prosecutor to present an appeal from an order of acquittal passed by a Magistrate in respect of a cognizable and non-cognizable offence. In such a case the District Magistrate may under Section 378(1)(a) direct the Public Prosecutor to file an appeal to the Session Court. This appears to be the right approach and correct interpretation of Section 378 of the Code.

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23.In view of the above, we conclude that a complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court. He cannot file such appeal in the Sessions Court."

9. Taking note of the decision rendered in **Satya Pal Singh's case, the Apex Court in Mallikarjun Kodagali (Dead) Represented through Legal Representatives V. State of Karnataka and others ((2019) 2 Supreme Court Cases 752)** considered the very same issue and held that a victim in a final Report filed by the police before the Court stands on a different footing than that of the complainant, who initiates action through a complaint. Accordingly, it was held that an appeal by the victim is maintainable under the proviso to Section 372 of Criminal Procedure Code sans a special leave which is otherwise required under Section 378(4) of Criminal Procedure Code. Such a Special Leave is obviously required on an appeal filed by the complainant under the said provison. This decision took note of the difference between a complainant and a victim.

10. Insofar as the difference between the 'victim' and the complainant' and their respective rights safeguarded under the provision has

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been dealt with by the Apex Court unanimously. However, a point of difference came through the dissenting judgment of one of the Honourable Judges as against the other two with respect to the grant of special leave even on an appeal filed invoking the proviso to Section 372 of Criminal Procedure Code by the victim.

11. Thus, we do not intend to partake except by merely quoting the requisite paragraphs.

> "66. In Satya Pal Singh v. State of Madhya Pradesh & Ors. this Court gave what appears to be a rather expansive interpretation to the proviso to Section 372 of the Cr.P.C. and concluded as follows:
>
> "15.....This Court is of the view that the right of questioning the correctness of the judgment and order of acquittal by preferring an appeal to the High Court is conferred upon the victim including the legal heir and others, as defined under Section 2(wa) Cr.P.C. under the proviso to Section 372, but only after obtaining the leave of the High Court as required under sub- section (3) of

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Section 378 Cr.P.C."

67. In this case the offence occurred on or about 19th July, 2010 and the decision of the Trial Court was delivered on 13th June, 2013. On a plain reading of the cited passage, it does appear that the date of the alleged offence and the judgment and order of the Trial Court is not relevant, meaning thereby that even if the offence was committed prior to 31st December, 2009 and the judgment and order was rendered prior to 31st December, 2009 the victim could prefer an appeal to the High Court after obtaining leave. This is not so, and therefore the misunderstanding of the expansive nature of the view expressed.

68. The two decisions of this Court mentioned above arise in two different fact situations. In National Commission for Women the offence and the judgment of the Trial Court were before 31st December, 2009. In Satya Pal Singh, the offence and the judgment of the Trial Court were after 31st December, 2009. None of these situations

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arise in the present appeals in which the offence was said to have been committed before 31 st December, 2009 while the judgment of the Trial Court was delivered after 31st December, 2009. We are concerned in these appeals only with the maintainability of an appeal by the victim under the proviso to Section 372 of the Cr.P.C. where the alleged offence was committed before 31 st December, 2009 and the judgment and order has been delivered by the Trial Court post 31st December, 2009. Therefore, none of the two decisions of this Court are of any real assistance to us.

.....

76.As far as the question of the grant of special leave is concerned, once again, we need not be overwhelmed by submissions made at the Bar. The language of the proviso to Section 372 of the Cr.P.C. is quite clear, particularly when it is contrasted with the language of Section 378(4) of the Cr.P.C. The text of this provision is quite clear and it is confined to an order of acquittal passed in a case

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instituted upon a complaint. The word 'complaint' has been defined in Section 2(d) of the Cr.P.C. and refers to any allegation made orally or in writing to a Magistrate. This has nothing to do with the lodging or the registration of an FIR, and therefore it is not at all necessary to consider the effect of a victim being the complainant as far as the proviso to Section 372 of the Cr.P.C. is concerned.

.....

81.As far as the present case is concerned, the offence took place on 06.02.2009 i.e. prior to 31.12.2009 and the order of acquittal was passed by the trial court on 28.10.2013. I am in a agreement with my learned brother that the right to file an appeal to the victim will arise only on the date when the judgment is passed by the trial court because then alone the victim has a right to urge that the acquittal is wrong or that the sentence awarded to the accused is not commensurate with the offence which the accused may have committed.

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Therefore, I have no doubt that the victim has a right to appeal and to that extent the judgment of the High Court is liable to be set aside.

.....

83.The only issue with which I am dealing is whether a victim while filing an appeal under Section 372 of CrPC in the High Court against the acquittal of an accused is required to obtain leave of the court under Section 378(3) CrPC.

12. The Apex Court took into consideration a case where an offence was committed before 31.12.2009, which is prior to the Amendment made by way of insertion of a proviso to Section 372 of Criminal Procedure Code but the judgment was delivered thereafter.

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13. The said judgement was also dealing with the case arising out of a Police Report. It was once again followed by a subsequent decision in **Naval Kishore Mishra V. State of U.P., and others ((2019) 13 Supreme Court Cases 182).**

"10. It is, however, submitted by her that the question

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whether the victim would also have to seek leave as would be a situation envisaged Under Section 378 of the Code of Criminal Procedure as in the case of the State has been considered and is no more res integra in view of the recent judgment of this Court in Mallikarjun Kodagalli (d) through legal representatives v. State of Karnataka and Ors. 2019 (2) SCC 752, where this Court opined that there is no need for a victim to apply leave to appeal against the order of acquittal while preferring an appeal Under Section 372 proviso to Code of Criminal Procedure."

14. Pursuant to the decision of the Full Bench in S.Ganapathy's case, the Registry transferred all the pending appeals to the Courts of Sessions. Some appeals were already disposed of, against which, revisions have been filed either by the complainant or the accused. In cases where the appeals are allowed, revisions have been filed by the accused and in cases where the appeals were dismissed, by the complainants. Similarly, such cases so filed were also dealt with and disposed of as revisions by the High Court. There are also matters pending both on transfer and filed afresh against the orders of acquittal by the complainant. There are also cases where appeals got

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allowed but not sought to be revised. This would include the convictions having given effect to. There may be also cases where such appeals have been dismissed but not taken up further on revision. These are all the situations, which we are facing with, while answering the reference. As stated, they are nothing but the fall out of the main reference being answered. Therefore, conscious of the said situation which assumes more concern, we are dealing with the reference.

15. On the above background, we ordered notices to be served upon the Associations of the Lawyers while permitting the counsels to make their submissions as Amicus. Having noted the decisions of the Apex Court, which we already placed on record, and in order to alleviate further confusion, we passed the following order on 03.10.2020.

> "As continuation of the proceedings before the Sessions Court, challenging the order of acquittal passed by the Magistrate Courts would cause further complication and also in cases where the matters have been transferred from the High Court, pursuant to the order of the Full Bench to the appropriate Sessions Court, we deem it appropriate to issue a general direction to all the Sessions Courts dealing with the cases pertaining to the orders of

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acquittal in complaint cases and matters transferred pursuant to the order of the Full Bench (S.Ganapathy Vs. N.Senthilvel (2016 (4) CTC 119) to keep them in abeyance until further orders to be passed by us. Further, the Sessions Courts are directed not to entertain any Appeal filed by the Complainant against the order of acquittal as in view of the judgment of the Apex Court in Mallikarjun Kodagali Vs. State of Karnataka (2019 (2) SCC 752), prima facie such an Appeal can only be maintainable before this Court under Sec.378(4) Cr.PC."

16. Heard Mr.Sarath Chandran and T.M.Mano for Mr.Govind Chandrasekar, learned counsel for the appellant in Crl.A.Nos.89 and 90 of 2020, Mr.Arun Ambumani and Mr.Arya Raj, learned counsel for the appellant in Crl.R.C.Nos.494 of 2019, Mr.S.Subramanian and Mr.S.Sudharshan, learned counsel for the respondent in Crl.R.C. No.494 of 2019, Mr.Vijayaraghavan, learned Amicus, Mr.N.Jothi, Mr.AR.L.Sundresan, learned Senior Counsel for Madras Bar Association, and Mr.A.Thiagarajan,learned Senior counsel for Madras High Court Association and Women Lawyers Association and perused the documents including the judgments produced.

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17. Before proceeding with the respective submissions made at the Bar, let us consider the principle governing. For the sake of repetition, consciously we do not wish to go into the primary issue – on the validity of the judgment rendered by this Court in S.Ganapathy's case.

18. ACTUS CURIAE NEMINEM GRAVABIT:

This is a Latin expression which means "the act of the Court shall prejudice no one". Thus, a Court is expected to correct the error resulting in a judgment, which would not have been rendered otherwise. After all, the role of the Court is to render justice. When injustice is a fallout of an order of Court, then it should be rectified at once. This principle is to be applied generally inter se parties. It would be nothing but fair on the part of the Court, which is assigned with the task of rendering justice to share the responsibilities for a wrong order. If a litigant acts upon a judgment of the Court which subsequently turns out to be incorrect/wrong, he cannot be made to suffer. After all, no court shall cause harm to an innocent litigant, who would not have otherwise suffered.

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Resultantly, an unfair advantage created in favour of a party by a wrong decision of a Court is required to be phased out. To invoke the said principle, one has to show prejudice. A litigation can never partake the role of a gambling or rolling of a dice.

18.2.The principle of an actus curiae neminem gravabit generally applies to a fact situation caused by the Court. Therefore, it is basically procedural in nature. An error of law arrived on a conscious consideration would not come within the sweep of this principle. A difference has to be made between an administrative order which could be called as void and nullity and a judicial one.

18.3.In this connection, we may profitably refer the celebrated judgment of Apex Court in A.R.Antulay V. R.S.Nayak and other ((1988) 2 Supreme Court Cases 602), wherein in paragraph 186 it has been held as follows:

"I am afraid this maxim has no application to conscious conclusions reached in a judicial decision. The maxim is not a source of a general power to reopen and

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rehear adjudication which have otherwise assumed finality. The maxim operates in a different and narrow area. The best illustration of the operation of the maxim is provided by the application of the rule of nunc-pro-tunc. For instance, if owing to the delay in what the court should, otherwise, have done earlier but did later, a party suffers owing to events occurring in the interregnum, the Court has the power to remedy it. The area of operation of the maxim is. generally, procedural. Errors in judicial findings, either of facts or law or operative decisions consciously arrived at as a part of the judicial-exercise cannot be interfered with by resort to this maxim. There is no substance in contention (h)."

18.4. There is a difference between a case involving mistake committed on fact and law. A mistake committed on fact applies to an individual case whereas law applies in rem, when a decision becomes a binding precedent. The degree of prejudice between a case involving a factual mistake and a legal mistake is different. If there is a legal

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error, pursuant to which all the litigants adopted a particular course, it cannot be stated that subsequent orders passed thereunder in all circumstances would become void.

18.5.When a Court by inadvertence or oversight omits to consider a binding precedent, resulting in a wrong interpretation of law affecting the rights of numerous parties, the principle of an actus curiae neminem gravabit has to be pressed into service. In such case, the obligation of the Court extends to the public domain though a named litigant may not come before it. As stated, the question of injury suffered and the prejudice caused is to be seen cumulatively on the set of cases with the avowed object of the remedy.

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19. RESTITUTION:

The Rule of Restitution has to be read in conjunction with the principle of actus curiae neminem gravabit. When a mistake is committed by a Court, a duty is imposed upon it to do complete justice while rectifying it.

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This doctrine is a common law principle. Therefore, it is a Court which comes to the aid of the party, who gets affected by this order when it touches judicial consciene. While doing so, the interest of both parties will have to be balanced. The aforesaid two principles have been considered by the Apex Court in Indore Development Authority V. Shailendra (Dead) through Legal Representatives and others ((2018) 3 Supreme Court Cases 412), which can be seen through the following paragraphs.

"PRINCIPLE OF RESTITUTION

184. While construing provisions of section 24(2) applicable in case of lis, we have to keep in consideration the principle of restitution which enjoins a duty upon the courts to do complete justice to the party at the time of final decision. Successful party at the end of the litigation has to be placed as far as possible at the same place unless it would have been had the interim order not being passed. In doing away the effect of interim order by resorting to fact of restitution is in fact obligation of the court.

185. In South Eastern Coal Field Ltd. v. State of Madhya Pradesh & Ors. (2003) 8 SCC 648 this court held that no party can take advantage of litigation; it has to disgorge the advantage gained due to delay in case lis is lost, the court has observed:

"26. In our opinion, the principle of restitution takes

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care of this submission. The word 'restitution' in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution or decree or order or the court or indirect consequence of a decree or order (See Zafar Khan and Ors. v. Board of Revenue, U.P., and Ors., : [1985] 1 SCR 287. In law, the term 'restitution' is used in three senses; (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, Seventh Edition, p.1315).

The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that 'restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done.

"Often, the result in either meaning of the term would be the same. ..... Unjust impoverishment, as well as unjust enrichment, is a ground for restitution. If the defendant is guilty of a non-tortuous misrepresentation, the measure of recovery is not rigid but, as in other cases of

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> restitution, such factors as relative fault, the agreed upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed."

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 of the C.P.C. speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice,

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would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the Court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing, wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

27. Section 144 of the C.P.C. is not the fountain source of restitution; it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In Jai Berham v. Kedar Nath Marwari (1923) 25 BOMLR 643, their Lordships of the Privy council said:

> "It is the duty of the Court under Section 144 of the Civil Procedure Code to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the

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circumstances towards all parties involved.

Cairns, L.C., said in Rodger v. Comptoir d'Escompte de Paris: (ER p.125)

> "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression, the act of the Court is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case".

This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it, A.A. Nadar v. S.P. Rathinasami, (1971) 1 MLJ 220 . In the exercise of such inherent power the Courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.

28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a

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mistake or error committed by the Court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise corned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the set of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous

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litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced, we are, therefore, or the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation." (emphasis supplied)

186.The doctrine of restitution in common law principle lies in conscience of court, it had also been discussed in State of Gujarat v. Essar Oil Ltd., (2012) 3 SCC 522; it was held that: (SCCp.542,paras 61-64)

> "61. The concept of restitution is virtually a common law principle and it is a remedy against unjust enrichment or unjust benefit. The core of the concept lies in the conscience of the Court which prevents a party from retaining money or some benefit derived from another which he has received by way of an erroneous decree of Court. Such remedy in English

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Law is generally different from a remedy in contract or in tort and falls within a third category of common law remedy which is called quasi-contract or restitution.

62. If we analyze the concept of restitution one thing emerges clearly that the obligation to restitute lies on the person or the authority that has received unjust enrichment or unjust benefit (See Halsbury's Laws of England, Fourth Edition, Volume 9, page 434).

63. If we look at Restatement of the Law of Restitution by American Law Institute (1937 American Law Institute Publishers, St. Paul) we get that a person is enriched if he has received a benefit and similarly a person is unjustly enriched if the retention of the benefit would be unjust. Now the question is what constitutes a benefit. A person confers benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other or in a way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another but also where he saves the other from expense or loss. Thus the word "benefit"

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therefore denotes any form of advantage (page 12 of the Restatement of the Law of Restitution by American Law Institute).

64. Ordinarily in cases of restitution, if there is a benefit to one, there is a corresponding loss to other and in such cases; the benefiting party is also under a duty to give to the losing party, the amount by which he has been enriched."

(emphasis supplied)

187. In A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, (2012) 6 SCC 430, by relying upon the decision rendered in Indian Council for Enviro- Legal Action v. Union of India [(2011) 8 SCC 161]. The jurisdiction to restitution is inherent in every court. Court has to neutralize advantage of litigation. The person on right side of law should not be frustrated. The wrongful gain of frivolous litigation has to be eradicated if faith of people in judiciary has to be sustained Court has to adopt pragmatic approach. The doctrine of restitution has been considered thus:

"37. This Court in another important case in Indian Council for Indian Council for Enviro-Legal Action v. Union of India and Ors. (2011) 8 SCC 161 (of which one of us, Bhandari, J. was the author of the judgment) had an occasion to deal with the concept of

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restitution. The relevant paragraphs of that judgment dealing with relevant judgments are reproduced hereunder:

170. This Court in Grindlays Bank Limited v. Income Tax Officer, Calcutta (1980) 2 SCC 191 observed as under:

When passing such orders the High Court draws on its inherent power to make all such orders as are necessary for doing complete justice between the parties. The interests of justice require that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court, by the mere circumstance that it has initiated a proceeding in the court, must be neutralised. The simple fact of the institution of litigation by itself should not be permitted to confer an advantage on the party responsible for it.

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171. In Ram Krishna Verma and Ors. v. State of U.P. and Ors. (1992) 2 SCC 620 this Court observed as under:

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"16.The 50 operators including the Appellants/ private

operators have been running their stage carriages by blatant abuse of the process of the court by delaying the hearing as directed in JeevanNathBahl's case and the High Court earlier thereto. As a fact, on the expiry of the initial period of grant after Sept. 29, 1959, they lost the right to obtain renewal or to ply their vehicles, as this Court declared the scheme to be operative. However, by sheer abuse of the process of law, they are continuing to ply their vehicles pending hearing of the objections. This Court in Grindlays Bank Ltd. v. Income- tax Officer - [1990] 2 SCC 191 held that the High Court while exercising its power under Article 226 the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised. It was further held that the institution of the litigation by it should not be permitted to confer an unfair advantage on the party responsible for it. In the light of that law and in view of the power under Article 142(1) of the Constitution this Court, while exercising its jurisdiction would do complete justice and neutralise the unfair advantage gained by the 50 operators including the Appellants in dragging the litigation to run the stage carriages on the approved route or area or portion thereof and forfeited their right to hearing of the objections filed by them to the draft scheme dated

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Feb. 26, 1959."

172. This Court in Kavita Trehan v. Balsara Hygiene Products (1994) 5 SCC 380 observed as under:

"22.The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words

"144.Application for restitution:-Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose,.".

The instant case may not strictly fall within the terms of Section 144, but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court.

173. This Court in Marshall Sons and Company (I) Ltd. v. Sahi Oretrans (P) Ltd. and Anr. (1999) 2 SCC 325 observed as under:

"4.From the narration of the facts, though it appears to us, prima facie, that a decree in favour of the Appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct

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the Respondent to deliver the possession to the Appellant since the suit filed by the Respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also known fact that after obtaining a decree for possession of immovable property, its execution takes long time. In such a situation for protecting the interest of judgment creditor, it is necessary to pass appropriate order so that reasonable mesneprofit which may be equivalent to the market rent is paid by a person who is holding over the property. In appropriate cases, Court may appoint Receiver and direct the person who is holding over the property to act as an agent of the Receiver with a direction to deposit the royalty amount fixed by the Receiver or pass such other order which may meet the interest of justice. This may prevent further injury to the Plaintiff in whose favour decree is passed and to protect the property including further alienation."

http://www.judis.nic.in

174. In Padmawati v. Harijan Sewak Sangh CM (Main)

No. 449 of 2002 decided by the Delhi High Court on 6.11.2008, the court held as under:

'6. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities

or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Court. One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person.'

We approve the findings of the High Court of Delhi in the aforementioned case.

175. The High Court also stated: (Padmavati case [(2008) 154 DLT 411], DLT pp. 414-415, para 9)

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"9. Before parting with this case, we consider it necessary to observe that one of the main reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrongdoer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrongdoers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years-long litigation. Despite settled legal positions, the obvious wrongdoers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that

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dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts".

184. In Ouseph Mathai and Ors. v. M. Abdul Khadir (2002) 1 SCC 319 this Court reiterated the legal position that: (SCC p.328, para 13)

"13. …[the] stay granted by the Court does not confer a right upon a party and it is granted always subject to the final result of the matter in the Court and at the risk and costs of the party obtaining the stay. After the dismissal, of the lis, the party concerned is relegated to the position which existed prior to the filing of the petition in the Court which had granted the stay. Grant of stay does not automatically amount to extension of a statutory protection."

188. In a relatively recent judgment of this Court in Amarjeet Singh and Ors. v. Devi Ratan and Ors. (2010) 1 SCC 417 the Court in para 17 of the judgment observed as under: (SCC pp.422-23)

'17. No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order

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and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim actus curiae neminem gravabit, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court...'

190. In consonance with the concept of restitution, it was observed that courts should be careful and pass an order neutralizing the effect of all consequential orders passed in pursuance of the interim orders passed by the court. Such express directions may be necessary to check the rising trend among the litigants to secure the relief as an interim measure and then avoid adjudication on merits.

191. In consonance with the principle of equity, justice, and good conscience judges should ensure that the legal process is not abused by the litigants in any

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manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to abuse the legal process must be effectively curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the Respondent or the Defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.

192. The court's constant endeavour must be to ensure that everyone gets just and fair treatment. The court while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation be ordered in order to discourage dishonest litigation. The object and true meaning of the concept of restitution cannot be achieved or accomplished unless the courts adopt a pragmatic approach in dealing with the cases." (emphasis supplied)

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188. In Krishnaswamy S. Pd. & Anr v. Union of India & Ors., Civil Appeal Nos.3376-3377 of 2000 decided on 21.02.2006 this Court has considered the question of restitution. This court has relied upon Eastern Coalfield's case (supra) and observed:

> "16.The maxim 'actus curiae neminem gravabit' i.e. an act of Court shall prejudice no man is an important one. The maxim "is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law", said Cresswell J. in Freeman v. Tranah (12 C.B. 406). An unintentional mistake of the Court which may prejudice the cause of any party must and alone could be rectified.
>
> 17.The maxim of equity, namely, actus curiae neminem gravabit:an act of court shall prejudice no man, is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other relevant maxim is, lex non cogit ad impossibilia: the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. (See: M/s U.P.S.R.T.C. v. lmtiaz Hussein (2006 (1) 800 380), ShaikhSalim Haji Abdul

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Khayumsab v. Kumar and Ors. (2006 (1) SCC 46), Mohammod Gazi v. State of M.P. and others (2000(4) SCC 342) and Gursharan Singh v. New Delhi Municipal Committee (1996 (2) SCC 459)." (emphasis supplied)"

20. **VOID OR NULLITY:**

Though these two phrases might look similar or same, there appears to be a distinct difference. Nullity is a result of an order or decision becoming void. When such a decision lacks inherent jurisdiction, it becomes nullity. If a decision is made pursuant to an earlier decision of a higher forum, which itself can be termed as per incuriam being ignorant of a binding precedent, the subsequent decision can be termed as void. However, such an order would not become a nullity. This is more so with a judicial decision. Thus, such an order though becomes void, for lack of jurisdiction, has necessarily to be challenged in the manner known to law. Accordingly, such a party aggrieved cannot be permitted to contend that it is not bound by an order passed by the judicial forum and therefore, entitled to treat it as non est. We buttress our view with the following passage in Anita International V. Tungabadra Sugar Works Mazdoor Sangh and others ((2016) 9 Supreme Court Cases 44).

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"54.We are also of the considered view, as held by the Court in the Krishnadevi Malchand Kamathia case8, that it is not open either to parties to a lis or to any third parties, to determine at their own, that an order passed by a Court is valid or void. A party to the lis or a third party, who considers an order passed by a Court as void or non est, must approach a Court of competent jurisdiction, to have the said order set aside, on such grounds as may be available in law. However, till an order passed by a competent Court is set aside, as was also held by this Court in the Official Liquidator, Uttar Pradesh and Uttarakhand and the Jehal Tanti cases, the same would have the force of law, and any act/action carried out in violation thereof, would be liable to be set aside. We endorse the opinion expressed by this Court in the Jehal Tanti case. In the above case, an earlier order of a Court was found to be without jurisdiction after six years. In other words, an order passed by a Court having no jurisdiction, had subsisted for six years. This Court held, that the said order could not have

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been violated while it subsisted. And further, that the violation of the order, before it is set aside, is liable to entail punishment, for its disobedience. For us to conclude otherwise, may have disastrous consequences. In the above situation, every cantankerous and quarrelsome litigant would be entitled to canvass, that in his wisdom, the judicial order detrimental to his interests, was void, voidable, or patently erroneous. And based on such plea, to avoid or disregard or even disobey the same. This course can never be permitted."

21. BINDING NATURE:

In a Multi Court System having its own hierarchy, judicial discipline requires precedence emanating from the higher forums, to be followed scrupulously. Articles 141, 142 and 144 of the Constitution of India make sure that the orders passed by the Apex Court are meant to be complied with by all the parties including the Courts. We make a reference to the recent judgment of the Apex Court in **Kantaru Rajeevaru (Sabarimala Temple Review-5J) V. Indian Young Lawyers Association through its**

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General Secretary and others ((2020) 2 Supreme Court Cases 1).

"42.The arguments and counter-arguments so made, need us to restate a few constitutional fundamentals. Under our constitutional scheme, the Supreme Court is given a certain pride of place. Under Article 129, the Supreme Court shall be a court of record and shall have all the powers of such a Court, including the power to punish for contempt of itself. Under Article 136, the Supreme Court has been granted a vast jurisdiction by which it may interfere with any judgment, decree, determination, sentence, or order made by any court or tribunal in the territory of India. Indeed, by Article 140, Parliamentary law may confer upon the Supreme Court such supplemental powers as may be necessary or desirable for the purpose of enabling the Court to exercise the jurisdiction conferred upon it by the Constitution more effectively. By Article 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts, which includes tribunals, within the territory of India, which ensures that the Supreme Court, being the final arbiter of disputes, will lay down law which will then be followed as a precedent by all courts and tribunals within the territory of India. Article 142 of the Constitution confers upon the Supreme Court the power to make

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such decree or order as is necessary for doing complete justice in any cause or matter pending before it. By Article 145(3), a minimum number of five Judges are the last word on the interpretation of the Constitution, as any case involving a substantial question of law as to interpretation of the Constitution must be decided by this minimum number of Judges.

43. What is of particular importance in this case is Article 144 of the Constitution of India, which is set out hereinbelow:

"144. Civil and judicial authorities to act in aid of the Supreme Court.—All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court."

At this juncture, it is important to understand the true reach of Article 144 of the Constitution of India. What is of great importance is that it is not judicial authorities alone that are to act in aid of the Supreme Court – it is all authorities i.e. authorities that are judicial as well as authorities that are non-judicial."

22. With the abovesaid principles in mind, let us consider the submissions made at the Bar.

23. The learned Amicus and the learned counsel appearing for the petitioners made the following submissions.

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The decision rendered by the Full Bench has to be declared as per incuriam. Since it was passed without being aware of the decision of the Apex Court governing the field. In view of the subsequent decisions made, it cannot be allowed to continue. The reliance made on Satya Pal Singh V.State of Madhya Pradesh and others ((2015) 15 Supreme Court Cases 613) is not correct. Sections 372 and 378 of the Criminal Procedure Code travel in their respective spheres and litigants cannot be made to suffer due to jumbling of these two provisions. Adequate remedies will have to be provided for them. If consequentially the matters are pending in different forms, necessary amends will have to be made with the judgments already rendered by the Sessions Court by treating them as nullity. Settled and concluded cases need not be opened. The submissions made above are sought to be supported by the following decisions.

1.M.Venkataraman V. D.G.Bhaskaran (2019 (5) CTC 129);

2.S.Ganapathy V. N.Senthilvel ((2016) 4 CTC 119);

3.Mallikarjun Kodagali (Dead) Represented through Legal Representatives V. State of Karnataka and others ((2019) 2 Supreme Court Cases 752;

4. Naval Kishore Mishra V. State of U.P., and others (2019 (5) CTC

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382);

5.Satya Pal Singh V. State of Madhya Pradesh and others ((2015) 15 Supreme Court Cases 613);

6. Ragini V. State of Maharashtra through the PSO and another (2019 SCC Online Bom. 697);

7. Shyam Sharan Tiwari Vs. State of U.P., and another (Crl.Revision No.352 of 2018 dt.06.02.2018)(Allahabad High Court);

8. Mast Ram Tiwari and another V. State of U.P.& others (CDJ 2018 All HC 200)(FB);

9. Roopendra Singh V. State of Tripura and another ((2017) 13 Supreme Court Cases 612);

10.State of M.P., V. Maharaj Singh (Dead) ((2019 SCC Online MP 4520);

11. Rakhu Sarif V. Panchanon Mondal (AIR 1937 Cal. 256);

12.Abdulla.. Accused In re (1924 SCC Online Rang 5);

13.Board of Trustees of Port of Kandla V. Hargovind Jasraj and another ((2013) 3 Supreme Court Cases 182);

14. Bhavuben Dineshbhai Makwana V. State of Gujarat and others (CDJ 2013 GHC 101)(FB);

15. Parmeshwar Mandal v. The State of Bihar and others (CDJ 2014

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Bihar HC 185);

16. Raghunath Yadav and others v. The State of Bihar (CDJ 2012 Bihar HC 081);

17. Baldev Sharma V. Gopal & another (CDJ 2017 Raj HC 957); and

18. Ram Phal V. State and others (CDJ 2015 DHC 768)(FB);

24. Mr.N.Jothi, learned counsel appearing as Amicus submitted that the reference itself cannot be sustained. It is still open to this Court to consider the issue of treating a victim and complainant alike, after all, there are very many similarities between them. One has to see the intendment of the legislature in this regard. In support of his contention, he relied on the following decisions.

1. Union of India and others V. Godfrey Philips India Ltd., ((1985) 4 Supreme Court Cases 369).

2. M/s Jit Ram Shiv Kumar and others Vs. State of Haryana and others ((1981) 1 Supreme Court Cases 11); and

3. M/s Motilal Padampat Sugar Mills Co., Ltd., V. State of Uttar Pradesh and others ((1979) 2 Supreme Court Cases 409).

25. The learned counsel appearing for the respondent submitted that a decision referred by the Court cannot be over turned. The parties inter se

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are bound by the same. Having undertaken the process of adjudication, it is not open to them to contend to the contrary. Reliance has been made on the decision of the Apex Court in **Gokaraju Rangaraju Vs. State of Andhra Pradesh ((1981) 3 Supreme Court Cases 132).**

26. DISCUSSION:

26.1.We have already decided that no purpose would be served in going into the issue qua a 'victim' and a 'complainant'. When the Apex Court has settled the issue, academic exercise is unnecessary and unwarranted. Suffice it is to state that after taking note of the Satya Pal Singh's case (supra), the Apex Court in Mallikarjun Kodagali's case (supra) has dealt with the case, which involves an offence committed prior to 31.12.2009, but the judgment delivered thereafter. Even prior to the said decision and that of the Full Bench, the said issue has been concluded by the Apex Court in Damodar S. Prabhu's case(supra). Therefore, the distinction between a 'victim' and 'complainant' is no longer the issue of controversy and thus, res integra.

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26.2.Having held so, let us come to the real issues involved. In pursuant to the decision rendered in S.Ganapathy's case(supra), the Registry of the High Court has sent all the appeals filed under Section 378 of Cr.P.C., to the respective Courts of Sessions.

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26.3.In some cases, appeals filed by the complainants were disposed of and the others are pending. We have already dealt with the situation in one of our preceding paragraphs. Suffice it is to state that all the appeals filed against the orders of acquittal rendered by the trial Court are preferred by the complainants only before the Courts of Sessions. This has occasioned only because of the decision rendered in S.Ganapathy's Case.

26.4.The principle governing actus curiae neminem gravabit will have to be applied in this case as we are not dealing with the individual cases and rather the consequence that flows out of the reference already answered by the earlier Full Bench of this Court. As stated, cases have been transferred on the administrative side of the High Court. Certainly, litigants cannot be put at fault. Though it can be contended that the decision rendered by the Apex Court in Damodar S. Prabhu's case could have been relied upon, at the best at this stage can only be an argument. It is a decision of the Registry and therefore even assuming an appeal could have been filed before this Court, the Registry would not have entertained it in view of the Full Bench judgment. Thus, we are constrained to hold that the principle of actus curiae neminem gravabit certainly applies in such cases. The impact on the

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interpretation of law has affected the litigants though they are not parties to the particular lis, over for which, they have no control. However, a decision made by a forum and that too, a judicial one has to be challenged. Any other interpretation would lead to disastrous consequences.

26.5.Having come to such a conclusion, let us deal with the situation, which we are facing. Insofar as the cases, which are pending before the respective Sessions Courts filed at the instance of the complainants aggrieved over the orders of the acquittal, they are to be transferred back to the file of this Court to be decided by the learned single Judge. As they have already been entertained when filed afresh, there is no question of seeking leave in tune with Section 378(5) of Cr.P.C. However, this would be made applicable only in those cases, which have been taken on file. Therefore, cases merely numbered but not taken on file by issuing notice to the respondents/accused, on transfer to this Court would require a special leave under Section 378(5) of Cr.P.C.

26.6.Cases where the matters are pending before this Court, at the instance of the complainant, after suffering the judgment confirming the order passed by the Court of first instance, are to be treated as appeals filed by the complainants by ignoring the judgment of the sessions Court.

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This we hold so for the reason that a complainant cannot be put at fault and the scope of appeal and revision is different. We make it clear that those of the pending revisions are to be treated as appeals. Even for these cases, there is no need for a special leave as much water has flown under the bridge.

26.7.Cases where revisions have been filed by the accused after conviction by the sessions court by reversing the order of acquittal, they are to be treated as appeals by the complainant. Therefore, there should be a transposition of parties by converting the revisions as appeals by treating them as the one filed by the complainants. Even in these cases, no fresh leave is required.

26.8.Insofar as the revisions, which have already been disposed of by this Court pertaining to the cases decided by the Court of Sessions in tune with the decision rendered in S.Ganapathy's case, they having attained finality, no further orders are required.

26.9.In cases where the appeals filed before the Courts of Sessions are also dismissed, the complainants can file an appeal under Section 378(4) of Cr.P.C against the order of acquittal passed by the Magistrate disregarding the orders of the Sessions Court. The limitation period will be

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calculated from the date on which the order of Sessions Court was made ready. In this case, a special leave is mandatorily to be obtained.

27. Insofar as the cases where a finality has reached, meaning thereby the judgment has been given effect to, a party is not entitled to contend that judgment of the Sessions Court has become nullity. As the position of law is settled that a mere compliance will not take away the right to challenge an order, it is well open to such a party to challenge it before this Court by way of a revision. This distinction we are constrained to draw as we are not inclined to open up the Pandora's box when parties have agreed to give effect to the judgment. After all, we are dealing with the situation, which has been created by the orders of the Court and not by the litigants. We need to undertake an exercise of judicial craftsmanship at times when the situation so warrants in order to tide over the situation and to secure the ends of justice.

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28.Accordingly, we answer the reference as under.

1. As against an order of acquittal passed by a Magistrate on a complaint, an appeal will lie only before the High Court, under Section 378 (4) of Cr.PC. In such cases, the complainant has to seek for Special leave under Section 378 (5) of Cr.PC. The first

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question in the order of reference is answered accordingly.

2. By virtue of the answer given to the first question, the questions 2 to 6 raised in the order of reference becomes more academic and therefore, there is no need to undertake the exercise of answering those questions.

3. The decision rendered in S.Ganapathi case is declared as a judgement per-incuriam, since it has been decided without reference to the binding authority in Damodar S.Prabhu and Subash Chand. That apart it is no longer a good law by virtue of the judgement of the Hon'ble Supreme Court in Mallikarjun Kodagali. We answer the 7th question in the order of reference accordingly and proceed to issue the following directions :-

(a) An appeal which was pending before this Court and which was remanded to the Sessions Court pursuant to S.Ganapathi (Supra) and the same is pending, the same should be transferred back to the file of the High Court and should be considered to be pending before the High Court. The same effect will be given even for cases where the original appeal was filed before the Sessions Court and is pending.

(b) In cases where the Sessions Court has confirmed the order of acquittal passed by the Magistrate and a

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revision petition has been filed before this Court by the complainant and the same is pending, the order of Sessions Court must be disregarded and the revision petition filed before this Court by the complainant must be treated as an Appeal by virtue of Section 401(5) of Cr.PC. Those revision petitions must be renumbered as Criminal Appeals by the Registry.

(c) In cases, where, the order of acquittal has been confirmed by the Sessions Court and it has not become final or it has not been acted upon by the parties and the complainant wants to challenge the same, he shall file a Criminal Appeal before this Court against the order passed by the Magistrate, disregarding the order passed by the Sessions Court, within the limitation period prescribed for filing Appeal and which shall be calculated from the date on which the Sessions Court order was made ready. In such cases, the complainant has to seek for a Special leave under Section 378 (5) of Cr.PC.

(d) In cases, where, the Sessions Court has reversed the order of acquittal passed by the Magistrate and the same has been challenged by the accused before this Court by way of revision petition and the same is pending, the same should be treated as an Appeal pending before this Court against the order of Acquittal passed by the Magistrate, by disregarding the order passed by the Sessions Court. In all those cases, the complainant must

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file a transpose petition and the Registry must convert the same as Criminal Appeals by showing the complainant as the Appellant and the accused as the respondent. The Memorandum of grounds of Criminal Appeal filed before the Sessions Court will be considered as the memorandum of grounds of appeal in the renumbered Criminal Appeal.

(e) In cases, where the Sessions Court has reversed the order of acquittal passed by the Magistrate and convicted the accused and this order has not become final or the same has not been acted upon, the accused person has to necessarily challenge the said order by filing a criminal revision petition before this Court by quoting this Full Bench judgement. After notice is served on the complainant and he enters appearance, the same should be treated as an Appeal pending before this Court against the order of Acquittal passed by the Magistrate, by disregarding the order passed by the Sessions Court. In all those cases, the complainant must file a transpose petition and the Registry must convert the revision as Criminal Appeal by showing the complainant as the Appellant and the accused as the respondent. The Memorandum of grounds of Criminal Appeal filed before the Sessions Court will be considered as the memorandum of grounds of appeal in the renumbered Criminal Appeal.

(f) In all those cases, where, either after remand or by means of filing, an Appeal has been finally decided by the

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Sessions Court and the same has not been challenged or it has been acted upon, the order passed by the Sessions Court will be final inter-partes and it cannot be re-opened by virtue of this judgement.

(g) In all those cases, where, the order of the Sessions Court was put to challenge before this Court, either by the complainant or by the accused, as the case may be, and final orders have been passed by this Court and it has become final inter-partes or has been acted upon, it cannot be re-opened by virtue of this judgement.

(M.M.S.,J.) (V.B.D.,J) (N.A.V.,J.)
28.05.2020

Index:Yes/No raa

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N.ANAND VENKATESH.,J

1. I had the benefit of going through the erudite judgement of my learned brother and I am completely in agreement with the same. However, I thought it fit to supplement the judgement by recording my views also.

2. The Law Commission of India in its 154th report, suggested certain changes to Section 378 of Cr.PC relating to Appeal against acquittal. Pursuant to the said suggestion, the Parliament amended Section 378 of Cr.PC by Act 25 of 2005, with effect from 23.06.2006. The amended provision is extracted hereunder :-

"In Section 378 of the Principal Act,

(i) for sub-section (1), the following sub-section (2), and subject to the provisions of Sub-sections (3) & (5), __

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an Appeal to the Court of session from an Order of Acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence.

(b) the State Government may, in any case, direct the Public Prosecutor to present an Appeal to the High Court from an Original or Appellate Order of an Acquittal

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passed by any Court other than a High Court (not being an Order under clause (a)] or an Order of Acquittal passed by the Court of Session in Revision."

3. The Hon'ble Supreme Court had an occasion to deal with the scope of this Amendment in **[Subash Chand Vs. State (Delhi Administration)] reported in 2013 2 SCC 17.** The relevant portions in the judgement is extracted hereunder :-

> 17. At the outset, it must be noted that as per Section 378(3) appeals against orders of acquittal which have to be filed in the High Court under Section 378(1)(b) and 378(2)(b) of the Code cannot be entertained except with the leave of the High Court. Section 378(1)(a) provides that, in any case, if an order of acquittal is passed by a Magistrate in respect of a cognizable and non-bailable offence the District Magistrate may direct the Public Prosecutor to present an appeal to the court of Sessions. Sub-Section (1)(b) of Section 378 provides that, in any case, the State Government may direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision. Sub-Section(2) of Section 378 refers to orders of acquittal passed in any case investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police

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Establishment Act, 1946 or by any other agency empowered to make investigation into an offence under any Central Act other than the Code. This provision is similar to sub-section(1) except that here the words 'State Government' are substituted by the words 'Central Government'.

18. If we analyse Section 378(1)(a) & (b), it is clear that the State Government cannot direct the Public Prosecutor to file an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence because of the categorical bar created by Section 378(1)(b). Such appeals, that is appeals against orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence can only be filed in the Sessions Court at the instance of the Public Prosecutor as directed by the District Magistrate. Section 378(1)(b) uses the words "in any case" but leaves out orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence from the control of the State Government. Therefore, in all other cases where orders of acquittal are passed appeals can be filed by the Public Prosecutor as directed by the State Government to the High Court.

19. Sub-Section (4) of Section 378 makes provision for appeal against an order of acquittal passed in case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This sub-section speaks of 'special leave' as

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against sub-section (3) relating to other appeals which speaks of 'leave'. Thus, complainant's appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. This is evident from sub-section (5) which refers to application filed for 'special leave' by the complainant. It grants six months period of limitation to a complainant who is a public servant and sixty days in every other case for filing application. Sub- Section (6) is important. It states that if in any case complainant's application for 'special leave' under sub-Section (4) is refused no appeal from order of acquittal shall lie under sub-section (1) or under sub- section (2). Thus, if 'special leave' is not granted to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate not the State Government can appeal against that order of acquittal. The idea appears to be to accord quietus to the case in such a situation.

20. Since the words 'police report' are dropped from Section 378(1) (a) despite the Law Commission's recommendation, it is not necessary to dwell on it. A police report is defined under Section 2(r) of the Code to mean a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code. It is a culmination of investigation by the police into an offence after receiving information of a cognizable or a non-cognizable offence. Section 2(d) defines a complaint to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, that some person, whether

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known or unknown has committed an offence, but does not include a police report. Explanation to Section 2(d) states that a report made by a police officer in a case which discloses after investigation, the commission of a non- cognizable offence shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant. Sometimes investigation into cognizable offence conducted under Section 154 of the Code may culminate into a complaint case (cases under the Drugs & Cosmetics Act, 1940). Under the PFA Act, cases are instituted on filing of a complaint before the Court of Metropolitan Magistrate as specified in Section 20 of the PFA Act and offences under the PFA Act are both cognizable and non-cognizable. Thus, whether a case is a case instituted on a complaint depends on the legal provisions relating to the offence involved therein. But once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence be bailable or non- bailable, cognizable or non-cognizable, the complainant can file an application under Section 378(4) for special leave to appeal against it in the High Court. Section 378(4) places no restriction on the complainant. So far as the State is concerned, as per Section 378(1)(b), it can in any case, that is even in a case instituted on a complaint, direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than High Court. But there is, as stated by us herein above, an important inbuilt and categorical restriction on the State's power. It cannot

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direct the Public Prosecutor to present an appeal from an order of acquittal passed by a Magistrate in respect of a cognizable and non-cognizable offence. In such a case the District Magistrate may under Section 378(1)(a) direct the Public Prosecutor to file an appeal to the Session Court. This appears to be the right approach and correct interpretation of Section 378 of the Code.

21. Mr. Malhotra is right in submitting that it is only when Section 417 of the Criminal Procedure Code, 1898 was amended in 1955 that the complainant was given a right to seek special leave from the High Court to file an appeal to challenge an acquittal order. Section 417 was replaced by Section 378 in the Code. It contained similar provision. But, Act No.25 of 2005 brought about a major amendment in the Code. It introduced Section 378(1)(a) which permitted the District Magistrate, in any case, to direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence. For the first time a provision was introduced whereunder an appeal against an order of acquittal could be filed in the Sessions Court. Such appeals were restricted to orders passed by a Magistrate in cognizable and non-bailable offences. Section 378(1)(b) specifically and in clear words placed a restriction on the State's right to file such appeals. It states that the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court not being an order under clause

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(a) or an order of acquittal passed by the Sessions Court in revision. Thus, the State Government cannot present an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence. We have already noted Clause 37 of the 154th Report of the Law Commission of India and Clause 37 of the Code of Criminal Procedure (Amendment) Bill, 1994 which state that in order to guard against the arbitrary exercise of power and to reduce reckless acquittals Section 378 was sought to be amended to provide appeal against an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence. Thus, this step is taken by the legislature to check arbitrary and reckless acquittals. It appears that being conscious of rise in unmerited acquittals, in case of certain acquittals, the legislature has enabled the District Magistrate to direct the Public Prosecutor to present an appeal to the Sessions Court, thereby avoiding the tedious and time consuming procedure of approaching the State with a proposal, getting it sanctioned and then filing an appeal.

22. It is true that the State has an overall control over the law and order and public order of the area under its jurisdiction. Till Section 378 was amended by Act 25 of 2005 the State could prefer appeals against all acquittal orders. But the major amendment made in Section 378 by Act 25 of 2005 cannot be ignored. It has a purpose. It does not throw the concern of security of the community to the winds. In fact, it makes filing of appeals against certain types of acquittal orders described in

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Section 378(1)(a) easier, less cumbersome and less time consuming. The judgments cited by Mr. Malhotra pertain to Section 417 of the Criminal Procedure Code, 1898 and Section 378 prior to its amendment by Act 25 of 2005 and will, therefore, have no relevance to the present case.

23. In view of the above, we conclude that a complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court. He cannot file such appeal in the Sessions Court. In the instant case the complaint alleging offences punishable under Section 16(1)(1A) read with Section 7 of the PFA Act and the Rules is filed by complainant Shri Jaiswal, Local Health Authority through Delhi Administration. The appellant was acquitted by the Metropolitan Magistrate, Patiala House Courts, New Delhi. The complainant can challenge the order of acquittal by filing an application for special leave to appeal in the Delhi High Court and not in the Sessions Court. Therefore, the impugned order holding that this case is not governed by Section 378(4) of the Code is quashed and set aside. In the circumstances the appeal is allowed.

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4. Even though, the Law Commission suggested the Employment of the Expression “Police Report” in proposing the amendment to Section 378 of Cr.PC., yet, the Parliament did not include the expression “Police Report”. This specific issue was dealt with by the Hon'ble Supreme Court in

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the above judgement. The Hon'ble Supreme Court took into consideration the definition of a “Police Report” under Section 2(r) and “Complaint” under Section 2(d) of Cr.PC. It was held that once a case is instituted on a complaint and an order of acquittal is passed, the complainant can file an application under Section 378(4) for Special leave to Appeal in the High Court. The Hon'ble Supreme Court took into consideration the marked difference when it comes to such appeal filed by the prosecution, wherein, certain checks and balances were introduced to check arbitrary exercise of power and to reduce reckless acquittals. The Hon'ble Supreme Court also took into consideration the fact that the amendment made filing of certain Appeals by the prosecution against certain types of acquittal orders prescribed under Section 378(1) (a) easier, less cumbersome and less time-consuming. Ultimately, the Hon'ble Supreme Court made it very clear in Paragraph No.23 of the Judgement that a complainant can file an application for Special Leave to Appeal against an order of acquittal of any kind only to the High Court. He cannot file such Appeal in the Sessions Court (Emphasis applied).

5. This judgment was passed on 08.01.2013. By then, Act 5 of 2009

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had come into force with effect from 31.12.2009, wherein a proviso was added to Section 372 of Cr.PC and the term “Victim” was introduced under Section 2(wa) of Cr.PC. The Hon'ble Supreme Court was well aware about these amendments and in spite of the same, the right of a complainant was specifically dealt at Paragraph No.23 of the Judgement without reading into it the term “Victim”, which was introduced under Act 5 of 2009.

6. If the parliament had intended to treat the complainant also like a victim, there was no necessity for the Parliament to retain Section 378 (4) of Cr.PC. The fact that this provision was left untouched, clearly goes to show that the Parliament retained the original right that was available to the complainant as it is.

7. The Right of Appeal is always a creature of the statute. The same is clear from the very language of Section 372 of Cr.PC, which categorically states that "no Appeal shall lie from any judgement or order of a Criminal Court except as provided for by the Code or by another Law for the time being in force." When this provision stood as such before the coming into force of Act 5 of 2009, it was only the State which can file an Appeal against acquittal in all cases which arises out of a “Police Report”. The "victim" did not have such a right and the only remedy that was

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available for a victim at that point of time was to file a Criminal Revision Petition against such acquittals. It must be borne in mind that even before the amendment came into force, the complainant was provided with an independent right of Appeal against acquittal under Section 378(4) of Cr.PC. Therefore, the complainant was treated differently under the Code. The Parliament thought it fit to recognize the rights of a victim in a criminal case which arises out of a "Police Report". The victims were left high and dry in all cases of acquittals arising out of a "Police Report" and even if the victims filed a revision petition against acquittals, the scope of interference was very limited than the scope of an Appeal. This necessitated the Parliament to bring in the amendment which specifically catered to the rights of a victim to a crime.

8. The Hon'ble Supreme Court in **[Damodar S.Prabhu Vs. Sayed Babalal H] 2010 5 SCC 663** has specifically held in Paragraph No.20 as follows :-

> 20. It may be noted here that Section 143 of the Act makes an offence under Section 138 triable by a Judicial Magistrate First Class (JMFC). After trial, the progression of further legal proceedings would depend on whether there has been a conviction or an acquittal.

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- In the case of conviction, an appeal would lie to the Court of Sessions under Section 374(3)(a) of the CrPC; thereafter a Revision to the High Court under Section 397/401 of the CrPC and finally a petition before the Supreme Court, seeking special leave to appeal under 136 of the Constitution of India. Thus, in case of conviction there will be four levels of litigation.
- In the case of acquittal by the JMFC, the complainant could appeal to the High Court under Section 378(4) of the CrPC, and thereafter for special leave to appeal to the Supreme Court under Article 136. In such an instance, therefore, there will be three levels of proceedings.

9. This judgement was delivered on 3rd May 2010, much after the amendment Act came into force. Even in this Judgement, the Hon'ble Supreme Court has independently considered the different reliefs that are available after a conviction or an acquittal in a case arising out of a "complaint". While dealing with the same, it was made clear that in a case of acquittal of an accused in a complaint, the Appeal will lie only before the High Court under Section 378 (4) of Cr.PC. This judgement was delivered by

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a Three Member Bench of the Hon'ble Supreme Court.

10. The judgement of the Full Bench in **S.Ganapathi (supra**) heavily relied upon the Full Bench Judgement of the Delhi High Court in **[Ram Paul V. State and others] reported in 2015 3 MWN Criminal 491** and the judgement of the Hon'ble Supreme Court in **[Satya Pal Singh Vs. State of Madhya Pradesh and others] reported in 2015 15 SCC 613.** It is important to note that both these cases arose on a "Police Report" and not on a Private Complaint. Therefore, both these judgements, with respect, cannot form the basis in a case where the Court was specifically dealing with the right of a complainant against an order of acquittal passed in a complaint. After a thorough search, we find that there is not a single case where the Hon'ble Supreme Court has equated the right of a complainant to that of a victim, in a case of acquittal arising out of a complaint. Even though, both the terms " Complainant" and "Victim" can be interchanged while using it as a term Per se, the same cannot be done when it comes to dealing with the right of filing an Appeal against acquittal. In a case arising out of a Police Report, whether a person is called as a victim or a complainant, proviso to Section 372 of Cr.PC will come into operation. However, when it comes to a

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complaint filed by a complainant, the Code deals with his right differently and gives him a separate path under Section 378 (4) of Cr.PC. By reading the term “Victim” into the term “Complainant” and attempting to create a right to the complainant under proviso to Section 372, will only end up in causing violence to the existing frame work of the code of Criminal Procedure. This was never intended by the Parliament and it does not fall within the scheme of things as provided under the Code of Criminal Procedure.

11. It is at this juncture, the judgement of the Three Member Bench of the Hon'ble Supreme Court in Mallikarjun Kodagalli (Supra) was delivered on 12.10.2018. This judgement also arose out of an acquittal in a case emerging from a “Police Report”. The Hon'ble Supreme Court dealt in detail regarding the right available to a victim. The majority judgement held that a victim as defined under Section 2(wa) of Cr.PC is entitled to file an Appeal against acquittal in view of the Proviso to Section 372 of Cr.PC, without seeking for any leave to Appeal under Section 378 (3) of Cr.PC. The minority judgement held otherwise only on this issue wherein the dissenting Judge held that even in such cases, the Victim has to seek for a leave to Appeal under Section 378(3) of Cr.PC. Insofar as the other issues are concerned, all the three Judges concurred. The relevant portions in the judgement is

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extracted hereunder :-

76. As far as the question of the grant of special leave is concerned, once again, we need not be overwhelmed by submissions made at the Bar. The language of the proviso to Section 372 of the Cr.P.C. is quite clear, particularly when it is contrasted with the language of Section 378(4) of the Cr.P.C. The text of this provision is quite clear and it is confined to an order of acquittal passed in a case instituted upon a complaint. The word 'complaint' has been defined in Section 2(d) of the Cr.P.C. and refers to any allegation made orally or in writing to a Magistrate. This has nothing to do with the lodging or the registration of an FIR, and therefore it is not at all necessary to consider the effect of a victim being the complainant as far as the proviso to Section 372 of the Cr.P.C. is concerned.

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90. Adverting to sub¬section (4) of Section 378 of CrPC, if an order of acquittal is passed on a case instituted upon a complaint then the High Court before entertaining an appeal by the complainant must grant special leave to appeal. The

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expression "Special leave to appeal" has no different meaning than the expression "leave to appeal" and it appears to me that the word “special” has been added only to distinguish “leave to appeal” sought by the complainant from the “leave to appeal” sought by the State. Thus, in a complaint case where the complainant has set the wheels of the Court in motion even if the complainant files the appeal he must obtain special leave to appeal. This again gives rise to an interesting question¬ Can the victim be placed on a higher pedestal than the complainant? More often than not, the victim and the complainant are likely to be one and the same person.

91. In case, I accept the proposition that the victim need not seek leave to appeal in case the appeal is to be filed in the High Court there shall be another anomalous situation. Supposing there are two victims in a case and one of the victims files a complaint and sets the wheels of justice moving and the case is tried as a complaint case. In case the accused is acquitted and the victim who is the complainant

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wants to file an appeal in the High Court, he will have to seek special leave to appeal whereas the victim who had not even approached the Court at the initial stage will be entitled to file an appeal without seeking leave to appeal. This could not have been the intention of the Legislature.

12. It is clear from the above that the Hon'ble Supreme Court in no uncertain terms has held that it is not necessary to consider the effect of a victim being the complainant as far as proviso to Section 372 of Cr.PC is concerned. There is no iota of doubt from the above judgment that the Hon'ble Supreme Court has clearly laid down the respective paths available to a victim in case of a Police Report and a complainant in a case arising out of a complaint. Both of them have been given a separate path to work out their right of Appeal. One cannot cross over into the path of the other and the Hon'ble Supreme Court has only reiterated the scheme that is already available under the Code of criminal procedure.

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13. This judgement was subsequently followed in [Naval Kishore Mishra Versus State of Uttar Pradesh and others] reported in AIR 2019 SC 3352.

14. It is also seen that almost all the High Courts (13 High Courts) have

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held that a complainant can file an Appeal against acquittal only before the High Court under Section 378 (4) of Cr.PC.

15. In view of the above, the Judgement of the Full Bench in S.Ganapathi (Supra) is no longer a good law. When a Magistrate acquits an accused in a case instituted upon a private complaint, the complainant can file an Appeal against such acquittal only before the High Court under Section 378(4) of Cr.PC. It goes without saying that he must seek for a Special Leave to Appeal before the Appeal is entertained by the High Court.

16. The above finding effectively answers the first question that has been raised in the order of reference. By virtue of this answer given to the First question in the order of reference, there is no need to answer questions II to VI raised in the reference. These questions become more academic in nature.

17. This Court will now enter into the VII and last question that has been raised in the order of reference which deals with the effect of over-ruling the Law laid down by the Full Bench in S.Ganapathi (Supra).

18. The decision rendered by the Full Bench in S.Ganapathi (supra) must be declared as a judgement per-incuriam, since it has been decided

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without reference to a binding authority in Damodar S.Prabhu (supra) and Subash Chand (supra). That apart, it is no longer a good law by virtue of the Judgement of the Hon'ble Supreme Court in Mallikarjun Kodagali (Supra).

19. The various possibilities of progression of the legal proceedings starting from the Magistrate Court, prior to and after the judgement in S.Ganapathi (supra), can be tabulated as under :-

Sl. No.	*Magistrate's Court (Trial Court)*	*Court of Sessions*	*High Court*	*Supreme Court*
PRIOR TO THE FB JUDGMENT IN S.GANAPATHY VS. N.SENTHILVEL (2016 (4) CTC 119)				
1.	Acquittal	--	Appeal under Section 378 (4) Cr.P.C against the acquittal by the Magistrate's Court Acquittal by the Magistrate's Court can either be confirmed or the Accused can be convicted	SLP under Article 136 of COI against the order passed by the High Court
2.	Conviction	Appeal under Section 374(3) (a) Cr.P.C against the conviction -- in such an Appeal, the conviction by the Magistrate	Revision under Sections 397 r/w 401 Cr.PC against confirmation of conviction or acquittal by the Court of Sessions	SLP under Article 136 of COI against the order passed by the High Court

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Sl. No.	*Magistrate's Court (Trial Court)*	*Court of Sessions*	*High Court*	*Supreme Court*
		Court can either be confirmed or reversed (i.e., the Accused is acquitted)	Conviction by the Court of Sessions can either be confirmed or the Accused can be acquitted. Acquittal by the Court of Sessions can either be confirmed or the acquittal can be set aside and the case be remanded.	
SUBSEQUENT TO THE FB JUDGEMENT IN S.GANAPATHY VS.N.SENTHILVEL (2016 (4) CTC 119)				
1.	Acquittal	Appeal under Section 372 Cr.PC against the acquittal -In such an Appeal, the acquittal by the Magistrate's Court can either be confirmed or reversed (i.e., the Accused is convicted)	Revision under Sections 397 r/w. 401 Cr.PC against confirmation of acquittal or conviction by the Court of Sessions. Conviction by the Court of Session would have either been confirmed or the Accused would have been	SLP under Article 136 of COI against the order passed by the High Court

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Sl. No.	*Magistrate's Court (Trial Court)*	*Court of Sessions*	*High Court*	*Supreme Court*
			acquitted. Acquittal by the Court of Sessions would have either been confirmed or the acquittal would have been set aside and the case remanded. *Another Appeal (instead of Revision) under Section 378 (4) Cr.PC against acquittal by the Court of Sessions was also a possibility*	
2.	Conviction	Appeal under Section 374 (3) (a) Cr.PC against the conviction - In such an Appeal, the conviction by the Magistrate's Court can either be confirmed or reversed (i.e., the Accused is acquitted)	Revision under Sections 397 r/w 401 Cr.PC against confirmation of conviction or acquittal by the Court of Sessions. Conviction by the Court of Sessions would have either been confirmed or the Accused would have been acquitted.	SLP under Article 136 of COI against the order passed by the High Court.

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Sl. No.	*Magistrate's Court (Trial Court)*	*Court of Sessions*	*High Court*	*Supreme Court*
			Acquittal by the Court of Sessions would have either been confirmed or the acquittal would have been set aside and the case remanded.	
		Appeal under Section 372 Cr.PC seeking enhancement of sentence - In such an Appeal, the sentence by the Magistrate's Court could be enhanced or the Appeal dismissed	Revision under Sections 397 r/w 401 Cr.PC against enhancement of sentence or refusal to enhance by the Court of Sessions	

20. The most important issue that requires a clear answer of this Full Bench is with regard to the effect of final orders that have already been passed by the Sessions Court, either after remand by this Court or on the Appeal filed before the Sessions Court. As a consequence, on challenge made to those orders before this Court which has either been confirmed or reversed. In other words, what will be the effect of the concluded

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proceedings inter-partes?

21. It is a settled law that where orders / judgements have become final between the parties and it has been accepted by the parties and acted upon, it should never be allowed to be re-opened. Even if a party considers an order or judgement to be void or non-est in law, he has to necessarily challenge that order /judgement on that ground. A party can never be allowed to disregard an order / judgement passed by a Court. If that is allowed, it will result in disastrous consequence. Useful reference can be made in this regard to the judgement of the Hon'ble Supreme Court in [Anita International Vs.Tungabadra Sugar Works MAzdoor Sangh and others] 2016 9 SCC 44 .The relevant portions in the judgement is extracted hereunder :-

> 54. We are also of the considered view, as held by the Court in the Krishnadevi Malchand Kamathia case, that it is not open either to parties to a lis or to any third parties, to determine at their own, that an order passed by a Court is valid or void. A party to the lis or a third party, who considers an order passed by a Court as void or non est, must approach a Court of competent jurisdiction, to have the said order set aside, on such grounds as may be available in law.

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However, till an order passed by a competent Court is set aside, as was also held by this Court in the Official Liquidator, Uttar Pradesh and Uttarakhand5 and the Jehal Tanti9 cases, the same would have the force of law, and any act/action carried out in violation thereof, would be liable to be set aside. We endorse the opinion expressed by this Court in the Jehal Tanti case9. In the above case, an earlier order of a Court was found to be without jurisdiction after six years. In other words, an order passed by a Court having no jurisdiction, had subsisted for six years. This Court held, that the said order could not have been violated while it subsisted. And further, that the violation of the order, before it is set aside, is liable to entail punishment, for its disobedience. For us to conclude otherwise, may have disastrous consequences. In the above situation, every cantankerous and quarrelsome litigant would be entitled to canvass, that in his wisdom, the judicial order detrimental to his interests, was void, voidable, or patently erroneous. And based on such plea, to avoid or disregard or even disobey the

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same. This course can never be permitted.

22. It will also be useful to draw inspiration from the judgement of the Hon'ble Supreme Court in [Janardan Reddy and others Vs.State of Hyderabad] and others in AIR 1951 SC 217 in this regard. The relevant portions in the judgement is extracted hereunder :-

> 34. The trend of decisions thus seems to be in favour of the view that if it should appear on the face of the return that a person is in detention in execution of a sentence on indictment on a criminal charge, that would be a sufficient answer to an application for a writ of habeas corpus. Assum- ing, however, that it is open even in such cases to investigate the question of jurisdiction, as was held in In re Anthers (3) it appears to us that the learned judges who (1) [1942] A. C. 284. (2) I.L.R. 44 Cal. 723. (3) (1889) 22 Q.B.D. decided that case went too far in holding that notwithstanding the fact that the conviction and sentence had been upheld on appeal by a court of competent jurisdiction, the mere fact that the trial court had acted without jurisdiction would justify interference, treating the appellate order also as a nullity. Evidently, the appellate court

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in a case which properly comes before it on appeal, is fully competent to decide whether the trial was with or without jurisdiction, and it has jurisdiction to decide the matter rightly as well as wrongly. If it affirms the conviction and thereby decides wrongly that the trial court had the jurisdiction to try and convict, it cannot be said to have acted without jurisdiction, and its order can not be treated as a nullity. It is true that there is no such thing as the principle of constructive res judicata in a criminal case, but there is such a principle as finality of judgments, which applies to criminal as well as civil cases and is implicit in every system, wherein provisions are to be found for correcting errors in appeal or in revision. Section 430, Criminal Procedure Code, and section 355 of the Hyderabad Criminal Procedure Code, have given express recognition to this principle of finality by providing that "Judgments and orders passed by an Appellate Court upon appeal shall be final, except in cases provided for in section 417 and Chapter XXXII."

35. It is well settled that if a court acts without jurisdiction, its

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decision can be challenged in the same way as it would have been challenged if it had acted with jurisdiction, i.e., an appeal would lie to the court to which it would lie if its order was with jurisdiction. [See Ranjit Misser v. Ramudar Singh (1); Bandiram Mookerjee v. Purna Chandra Roy C); Wajuddi Pramanik v. Md. Balaki Moral (3); and Kalipada Karmorkar v. Sekher Bashini Dasya(4)]. There- fore, the High Court at Hyderabad had jurisdiction to hear and decide the appeal in this case. In view of this fact, the deprivation of life or liberty, upon which the case of the (1) (1912) 16 O.L.J. 77. (3) 30 C.W.N. 63 at 64. (2) I. L. R. 45 Ca1, 926 of 929. (4) 24 C.L.J. 233. petitioners is founded, has been brought about in accordance with a procedure established by law, and their present detention cannot be held to be invalid.

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23. Even though, we hold S.Ganapathi (supra), as judgement per-incuriam, the consequence of this judgement which has resulted in orders being passed and which has become final / acted upon by the parties, can never be allowed to be re-opened. This is more so in cases where it has been

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subsequently affirmed or reversed by this Court. The parties did have an opportunity to put forth their case before this Court and this Court also had an opportunity to look into the merits of the case and pass final orders. The parties had sufficient opportunity to put forth their case up to this Court and therefore, by no stretch, the same can be allowed to be reopened by virtue of this Judgement. Therefore, the way forward as a consequence of this judgement can be provided only for pending cases.

24. The fall out of the present judgement rendering the earlier Full Bench Judgement of S.Ganapathi (Supra) as 'per-incuriam' and no longer a good law, has been lucidly explained and dealt with by the Author of the main judgement and therefore, there is no requirement to once again deal with the same in detail.

I am in complete agreement with the answers given to the questions referred to us and the consequential directions issued.

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(N.A.V.,J)
28.05.2020

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M.M.SUNDRESH,J. V.BHARATHIDASAN,J.

and
N.ANAND VENKATESH,J.
raa

Pre-Delivery Common Judgment in
Crl.A. Nos.89 & 90 of 2020 and
Crl.R.C. Nos.494 & 536 of 2019
& Crl.M.P.No.1789, 1794 & 7289 of 2019

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